SIM YAW BOON A

v.

CHIENG TIONG CHUNG

HIGH COURT SABAH & SARAWAK, KUCHING B
RHODZARIAH BUJANG JC
[CIVIL APPEAL: 12-38-2009-II]
18 JUNE 2009

CIVIL PROCEDURE: *Judgments and orders - Appeal against order of sessions court judge - Whether order non-appealable as it did not come under definition of "decision" in s. 3 Courts of Judicature Act 1964 - Principles applicable - Courts of Judicature Act 1964, ss. 3, 4 - Subordinate Courts Rules 1980, O. 1 r. 6, O. 49 r. 6(1) - Rules of the High Court 1980, O. 55, O. 56 r. 1 - Subordinate Courts Act 1948, s. 109* C D

CIVIL PROCEDURE: *Appeal - Appeal from sessions court - Whether order of sessions court judge non-appealable as it did not come under definition of "decision" in s. 3 Courts of Judicature Act 1964 - Principles applicable - Courts of Judicature Act 1964, ss. 3, 4 - Subordinate Courts Rules 1980, O. 1 r. 6, O. 49 r. 6(1) - Rules of the High Court 1980, O. 55, O. 56 r. 1 - Subordinate Courts Act 1948, s. 109* E

STATUTORY INTERPRETATION: *Construction of statutes - Conflicting statutes - Appeals from lower courts - Inconsistencies between provisions of statutes - Whether provisions of parent Act must prevail - Courts of Judicature Act 1964, s. 3 - Subordinate Courts Rules 1980, O. 49 r. 6(1)* F

WORDS & PHRASES: *"decision" - Courts of Judicature Act 1964, s. 3 - definition of* G

This was an appeal by the plaintiff against the decision of the sessions court judge upholding, before the start of the trial, the defendant's objection regarding the admissibility of certain documents that the plaintiff intended to adduce at the trial. The defendant raised a preliminary objection against the plaintiff's appeal, submitting that the order made by the sessions court judge on the non-admissibility of those documents was non-appealable as it did not come under the definition of "decision" in s. 3 of the Courts of Judicature Act 1964 ('CJA'). The plaintiff, however, contended H I

A that s. 3 of the CJA was in conflict with O. 49 r. 6(1) of the Subordinate Courts Rules 1980 ('SCR') which provides that an appeal from any decision other than a decision made after trial by the court shall lie to a judge in chambers, with the case of *Wood View Engineering Sdn Bhd v. Lim Chan Kwang* being cited as B authority. The view of the learned judge in that case was that the provision in not just O. 49 of the SCR but also O. 56 r. 1 of the Rules of the High Court 1980 ('RHC') must be interpreted as an exception to s. 3 of the CJA, meaning that s. 3 of the CJA is not applicable to decisions made by sessions court judges, magistrates C and senior assistant registrars. In deciding so, the learned judge followed the decision in *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd.*

Held (dismissing the appeal with costs):

D **(1)** This court could not agree with the decisions in *Wood View (supra)* and *Thong Guan (supra)* for the following reasons. Firstly, the RHC and SCR are made under the parent Acts *ie*, the CJA and Subordinate Courts Act 1948 ('SCA'), and are thus subservient in nature. Section 4 of the CJA and s. 109 of E the SCA both provide that in the event of inconsistencies between provisions of the Act and any other written law other than the Constitution, the provisions of the Act shall prevail. Since the RHC, SCR and SCA do not define "decision" the definition under s. 3 of the CJA, being the parent Act that F regulates the provisions on appeals in the RHC from both the lower courts and the registrars in the High Court, must be adopted. Secondly, the rationale in *Wood View (supra)* that adopting this definition of "decision" would render O. 49 r. 6(1) of the SCR useless because all interlocutory appeals from G the lower courts would be caught by the definition and would therefore be unappealable, was incorrect. This is simply because there are interlocutory applications and hence decisions from the lower courts which would dispose of the rights of the parties, for instance, summary judgment and striking out applications. H Thirdly, O. 49 r. 6(1) of the SCR and O. 55 of the RHC merely regulate how to proceed with appeals from the lower courts ie, whether it should be in open court or in chambers. Viewed in this context, it is not at all contradictory to the definition of "decision" in the CJA so as to render O. 49 I

r. 6(1) of the SCR meaningless. Therefore, there is no necessity to try and harmonise the provisions in the SCR and the RHC with that definition of "decision" in the CJA for they already complement each other. Additionally, this court could not accede to the plaintiff's submission that the definition of "decision" did not apply in this case because the trial in the sessions court had not even started when the decision was made. This was because even though the trial had not proceeded, that decision was made in a "hearing" which is defined in O. 1 r. 6 of the SCR as any proceeding in court or in chambers. For these reasons, the preliminary objection made by the defendant was upheld and this appeal ruled incompetent as the decision of the sessions court judge was non-appealable. *Wood View Engineering Sdn Bhd v. Lim Chan Kwang* (not foll); *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd* (not foll); *See Teow Chuan & Anor v. Dato' Anthony See Teow Guan* (dist). (paras 11-16)

Case(s) referred to:

Director of Customs, Federal Territory v. Ler Cheng Chye (liquidator of Castwell Sdn Bhd) (In Liquidation) [1995] 3 CLJ 316 SC ***(refd)***

Kissen Kamini v. Ram Ch 12 WR 13 ***(refd)***

R v. Patel [1951] 2 All ER 29 ***(refd)***

See Teow Chuan & Anor v. Dato' Anthony See Teow Guan [2006] 2 CLJ 292 CA ***(dist)***

Sheetul Pd v. Junmeroy, 12 WR 244

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA

Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd [2001] 5 CLJ 244 HC ***(not foll)***

Wood View Engineering Sdn Bhd v. Lim Chan Kwang [2006] 5 CLJ 62 HC ***(not foll)***

Legislation referred to:

Companies Act 1965, s. 292
Courts of Judicature Act 1964, ss. 3, 4
Government Proceedings Act 1956, s. 10(1)
Rules of the High Court 1980, O. 55, O. 56 r. 1
Subordinate Courts Act 1948, s. 109
Subordinate Courts Rules 1980, O. 1 r. 6, O. 49 r. 6(1)

A *For the appellant - Leong Hsin Ru (Victor Ng with her); M/s Tang & Partners*
For the respondent - Sheena Chuah Sze Ching; M/s Griffin Associates Advocates

Reported by Suresh Nathan

B

JUDGMENT

Rhodzariah Bujang JC:

C **[1]** This appeal turns on the decision of the learned Sessions Court Judge, who, before the start of the trial upheld the defendant's objection as regards the admissibility of certain documents intended to be adduced at the trial by the plaintiff. The plaintiff has filed an appeal against that decision and before me the D defendant's counsel has raised a preliminary objection against that appeal, contending that it has run afoul of s. 3 of the Courts of Judicature Act 1964 ("CJA"). To facilitate a better understanding of the arguments made in this appeal, I would first refer to the pleadings of the parties.

E

Pleadings

[2] In short, the plaintiff's claim was in respect of the balance of price of earth sold and delivered to the defendant at the defendant's own request. The amended defence of the defendant was that the F transactions were illegal in that the plaintiff has not obtained a permit from the Land and Surveys Department to sell the said earth or alternatively that what had been sold to them have been fully paid for when they effected payment of RM58,562. Further, they pleaded that they had no knowledge of the invoices for the earth sold as G mentioned by the plaintiff in their statement of claim and, *inter alia*, pleaded that they 'strongly' disputed that 3765 loads of earth were sold and delivered to them or that they were of the quantities and prices as contended by the plaintiff. In their re-amended reply, the plaintiff, *inter alia*, contended that the invoices in respect of the H deliveries have been given personally to the defendant and that the agreement to sell the earth were evidenced by 17 invoices of various dates and that they will rely on these invoices at the trial of the action.

I

The Stage Of The Proceeding

[3] The trial of the case was fixed on 27 April 2009. Before it commenced, the defendant's counsel objected to documents which she itemised and grouped in her written submission as 'B' and 'C'. These are documents which appeared in two bundles of disputed documents prepared by the plaintiff.

The Documents

[4] What they were, said the defendant's counsel are payment vouchers issued by the plaintiff to third parties (grouped under 'B') and invoices issued by third parties and correspondences between the plaintiff and such third parties (grouped under 'C'). The detailed references of these documents appeared at pp. 273 and 274 of the appeal record.

The Learned Sessions Court Judge's Ruling

[5] In his written ruling which appears at pp. 270-271 of the appeal record, the learned Sessions Court Judge agreed, *inter alia*, that the documents grouped under 'B' and 'C' have no relevance to the plaintiff's case and allowed the said objection. I would like to note at this stage that I have checked the disputed bundle of documents reproduced at pp. 50-120 and 121-227 of the appeal record and would have to agree that they are in respect of third parties, other than the plaintiff and defendant for whom no references were made in the pleadings of the parties but before going further into the merits of the appeal I need to address the preliminary objection raised by the defendant.

The Preliminary Objection

[6] The defendant submitted that the order made by the learned Sessions Court Judge on the non-admissibility of these documents is non-appealable as it does not come under the definition of 'decision' in s. 3 of the CJA. She cited the case of *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177 where the Court of Appeal held that a ruling made in the course of a trial or a hearing which does not finally dispose the rights of the parties does not come within the definition of s. 3 of the CJA and is therefore non-appealable.

[7] The plaintiff's counsel however replied, relying on the decision of the Court of Appeal in *See Teow Chuan & Anor v. Dato' Anthony See Teow Guan* [2006] 2 CLJ 292 to say that if the document ruled as inadmissible by the trial judge formed the basis of the plaintiff's claim, then that decision of the trial judge had disposed of the rights of the parties and is appealable.

[8] This decision is clearly distinguishable because as mentioned earlier the documents ruled admissible by the learned Sessions Court Judge were not the invoices in respect of the plaintiff's claim which they said were personally delivered to the defendant.

[9] She also submitted that s. 3 of the CJA 1964 is in conflict with O. 49 r. 6(1) of the Subordinate Courts Rules 1980 ("SCR 1980") which provides that an appeal from any decision other than decision made after trial by the court shall lie to a judge in chambers. She cited as authority, the decision of David Wong Dak Wah JC (as His Lordship then was) in *Wood View Engineering Sdn Bhd v. Lim Chan Kwang* [2006] 5 CLJ 62. Reading His Lordship's decision, it would appear to me that his view is that the provision in not just O. 49 but also O. 56 r. 1 of the Rules of the High Court 1980 ("RHC 1980") must be interpreted as an exception to s. 3 of the CJA. In other words, s. 3 is not applicable to decisions made by Sessions Court Judges, Magistrates and Senior Assistant Registrars. In deciding so, His Lordship followed the decision in *Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd* [2001] 5 CLJ 244.

[10] With the utmost respect, I am unable to agree with the decision of these two learned judges for these reasons.

[11] Firstly, both the Rules of the RHC 1980 and SCR 1980 are made under the parent Acts ie the CJA and Subordinate Courts Act 1948 ("SCA"). Being rules made under parent Acts, they are subservient in nature and this position cannot be made any clearer that s. 4 of the CJA and s. 109 of the SCA which both provides that in the event of inconsistency between the provisions of the Act and any written law other than the Constitution, the provision of the Act shall prevail.

[12] Since, both these Rules and the SCA do not define 'decision', therefore the definition under s. 3 of the CJA must be adopted being the parent Act that regulates the provisions on appeals in the RHC from both the lower courts and the registrars in the High Court.

[13] Secondly, I disagree with the rationale made by David Wong Dak Wah, JC that adopting this definition of 'decision' would render useless O. 49 r. 6(1) because all interlocutory appeals from the lower court would be caught by the definition and therefore unappealable. This is simply because there are interlocutory applications and hence decisions from the lower courts which would dispose the rights of the parties, for instance, summary judgment applications and striking out applications.

[14] Thirdly, O. 49 r. 6(1) of SCR and O. 55 of RHC, for that matter, in my view merely regulate how the appeals from the lower court is to be proceeded with ie whether it should be in open court or in chambers and viewed in this context it is not all contradictory to the definition of 'decision' in the CJA so as to render the said O. 49 r. 6(1) of SCR meaningless. Therefore, there is no necessity to try and harmonize the provisions in the said Rules with that definition of decision in the CJA for they are already complementary to each other. In this regard, I believe I am not being disrespectful to the decision of the Supreme Court in *Director of Customs, Federal Territory v. Ler Cheng Chye (liquidator of Castwell Sdn Bhd) (In Liquidation)* [1995] 3 CLJ 316 relied upon by David Wong Dak Wah, JC because the Supreme Court in that case was faced with two conflicting provisions in Acts of Parliament, *viz*, s. 10(1) of the Government Proceedings Act 1956 and s. 292 of the Companies Act 1965. The interpretation task here is in respect of a provision in an Act of Parliament and that of a subsidiary legislation made thereunder and in which there is already a specific provision on the superiority of the provision in the Act, as I mentioned earlier.

[15] Additionally, I would also consider the submission point made by the plaintiff's counsel in opposition to this preliminary objection that the definition of 'decision' also does not apply in this case because the trial in the Sessions Court have not even started when the decision was made. Again, with respect, I am unable to accede to this contention because even though the trial has not proceeded, that decision was made in a 'hearing' which is defined in O. 1 r. 6 of the SCR 1980 as any proceedings in court or in chambers.

[16] For these reasons, I uphold the preliminary objection made by the defendant's counsel and rule that this appeal is incompetent as the decision of the learned Sessions Court Judge was non-appealable.

A

The Appeal Proper

[17] Assuming that I was wrong in coming to this decision, I move now to consider the merits of the appeal.

B

[18] The plaintiff's counsel has registered a strong protest against the stage of proceeding when the objection on admissibility was raised. I would agree with her that procedurally it is wrong to decide on the admissibility of evidence before the evidence is tendered. The cases cited by her culled from *Sarkar's Law of Evidence* may be rather old but these are time-honoured laws of evidence which I am not aware have ever been discarded. In *R v. Hansmond, sup; R v. Patel* [1951] 2 All ER 29, it was held that an objection should be taken when the evidence is tendered and not before and that the proper time to object to the admissibility of evidence is when the evidence is tendered (*Kissen Kamini v. Ram* Ch. 12 WR 13; *Sheetul Pd v. Junmeroy*, 12 WR 244). Although doing what the defendant did would be to save time and costs, nevertheless it takes away the right of the plaintiff to adduce evidence which they think is relevant to their case and the learned Sessions Court Judge should not jump the gun before witnesses were called by deciding on the relevancy of disputed documents prepared and bundled by the parties. The preparation of the bundles of documents before the trial is merely to expedite and smoothen the trial process especially when parties have agreed on whether these documents should be disputed, agreed as to the authenticity or content, or both.

C

D

E

F

[19] In my view the fact that the relevancy and admissibility of these documents were decided even before the evidence was sought to be adduced is wrong.

G

[20] Another matter which I must mention also is that the defendant has questioned, in their counsel's written submission, the learned Sessions Court Judge's decision to disallow their objection in respect of documents grouped under 'A' and ordered translations of documents under 'D'. Additionally, I was also asked to order that certain witness statements or part of witness statements going to be tendered at the trial "be removed and or be disallowed at trial".

H

[21] I do not see how I can even consider this request when the defendant did not file a cross-appeal against the decision of the learned Sessions Court Judge.

I

Conclusion Of The Appeal

[22] I must admit that my decision to allow the preliminary objection and to rule that the appeal is incompetent runs counter to the conclusion I reached when considering the merits of the appeal. However I could not decide any other way and am comforted by the thought that the parties can always appeal against a decision of the trial judge after a full trial where this whole issue of the admissibility of documents can be argued, if necessary.

[23] In the result, the preliminary objection is allowed and the appeal dismissed with costs to be taxed unless agreed.